

STATE OF MICHIGAN
COURT OF APPEALS

CHRIS BURTON and SHARON BURTON,

Plaintiffs-Appellants,

v

EDWARD TOPACZ,

Defendant-Appellee.

UNPUBLISHED

August 18, 2000

No. 212627

Wayne Circuit Court

LC No. 96-628299-NO

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for a directed verdict. We affirm in part, reverse in part, and remand for a new trial.

Plaintiffs and defendant are neighboring landowners. Although the area is zoned as residential, defendant has an orchard consisting of approximately three hundred apple, pear, plum, and peach trees. Defendant sprays half of his orchard with a hand sprayer, but uses a machine to propel treat the other half of the orchard. Defendant uses the chemical Captain to kill fungus and the chemical Imidan to kill insects. He also uses Napa soap to treat the trees. Defendant testified that he followed various precautions prior to spraying. He would place a notice indicating the dates of treatment and the substance involved in the treatment. Additionally, defendant testified that he would only spray when there was no wind, in order to prevent the treatment from drifting. He also never sprayed over eight feet in the air.

Plaintiffs asserted that defendant did not follow the guidelines for spraying. Rather, he randomly sprayed at all times of the day and during periods of high wind. Plaintiff Sharon Burton suffered from asthma, and her condition was exacerbated by the chemicals. She testified that she previously lived in a rural area, had moved to the city, then to her current home in the rural area that is the location of this dispute. Plaintiff Sharon Burton testified that she could not differentiate, by view, the type of drift that occurred, but knew when chemicals had been sprayed because of the symptoms she experienced. Plaintiffs disputed defendant's testimony that he only sprayed in accordance with the directions found on the label of the chemicals. Their testimony and documentary evidence indicated that the drift was in excess of eight feet off the ground. Furthermore, they presented evidence that indicated that defendant

had sprayed on a day when the wind was recorded at thirteen miles per hour. They also presented evidence that defendant was given a cease and desist order due to improper spraying.

Throughout the trial, there were numerous exchanges between the trial court and plaintiffs' counsel. At one point in the trial, plaintiffs' counsel moved for a mistrial. The trial judge denied the motion, but indicated that he would be willing to give plaintiff's counsel "something else." The trial judge also expressed his belief that this was a neighborhood dispute that did not belong in court. After allowing argument on defendant's motion for a directed verdict, the trial court held that plaintiffs could not maintain a cause of action for malicious prosecution. During argument regarding the trespass claim, the trial judge interrupted plaintiffs' counsel, reiterated his belief that "this" was a "neighborhood feud" that was "not going to be solved by lawsuit," and dismissed the case in its entirety. The trial court denied a motion to disqualify, and a motion to disqualify the trial court was also denied by the chief judge.

Plaintiffs first argue that the trial court erred in directing a verdict of their negligence claim. We agree. We review a trial court's decision on a motion for a directed verdict de novo. *Kubisz v Cadillac Gage Textron, Inc.*, 236 Mich App 629, 634; 601 NW2d 160 (1999). The court, when evaluating the directed verdict motion, must evaluate the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 634-635. The plaintiff must prove four elements to establish a claim of negligence: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Hampton v Waste Management of Michigan, Inc.*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Directed verdicts are viewed with disfavor in negligence cases. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). Defendant contends that the trial court properly dismissed this cause of action because plaintiffs failed to establish that the spraying was negligent and that the spraying caused their injuries. Viewing the evidence and all legitimate inferences in favor of the nonmoving party reveals that reasonable jurors could have reached different conclusions regarding negligence, and therefore, directed verdict of this claim was erroneous. Plaintiffs testified that defendant did not comply with the instructions for pesticide use. Specifically, he did not spray when conditions were optimum to prevent drift. Rather, he allegedly sprayed on a day when the wind was recorded at thirteen miles per hour. Furthermore, he was previously provided a cease and desist order for spraying. Defendant's reliance on the testimony of Stanley Kuchta, a Michigan Department of Agriculture employee, is without merit. While Kuchta found that defendant complied with the law, he did not conclude that defendant complied on the dates alleged by plaintiffs. Rather, on a day when Kuchta gave *prior warning of a visit* to the home, Kuchta concluded that defendant complied with spraying requirements. Kuchta did not opine that defendant complied with the law at all times. In fact, Kuchta noted that, on a date of an alleged violation raised by plaintiffs, the wind was recorded at thirteen miles per hour.

Furthermore, defendant's contention that the trial court properly excluded evidence of causation is without merit. Plaintiff Sharon Burton concluded during her testimony that a toxic drift was approaching her home. Defense counsel raised an objection to this testimony. However, plaintiff Sharon Burton then testified that she could not visually distinguish a soap drift from a chemical drift, but could distinguish the drifts based on the symptoms she experienced and the smell. While defendant contends that plaintiff Sharon Burton's aggravation of asthma was due to her move from the city to a

rural area, she testified that she initially lived in a rural area moved to the city then moved to defendant's neighborhood. Furthermore, plaintiff Sharon Burton recorded defendant's posting of his sprayings, and defendant acknowledged that he kept a log of the chemicals sprayed. The issue of causation is for the jury, *Reeves Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998), and the trial court should not have decided this issue when a factual dispute was presented.¹

Plaintiffs next argue that the trial court erred in granting a directed verdict of the trespass claim. We disagree. In Michigan, a cause of action for trespass is not recognized for airborne particulate. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 73; 602 NW2d 215 (1999).

Plaintiff next argues that the trial court erred in excluding evidence of improper spraying that occurred prior to 1994. When this issue arose before the trial court, oral argument did not occur on the record. Rather, the trial court ordered the parties to approach for a sidebar. The trial court reached a conclusion, but did not place the basis for its conclusion on the record. The trial court also indicated that at the end of the testimony, plaintiffs' counsel would be permitted to make a record regarding the evidentiary ruling. However, the objection, response, and conclusion were not placed on the record at the conclusion of the testimony. Because of the deficiency in the record, we cannot reach this issue. However, in light of our conclusion that a new trial is warranted on the negligence issue, plaintiffs are not prejudiced by the trial court's failure to make a record of this issue. A circuit court judge is required to follow published decisions of the Court of Appeals and Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). There is no similar requirement that one circuit court judge follow the decision of another. *Id.* Accordingly, on retrial, plaintiffs are entitled to revisit the evidentiary issues ruled on at the first trial.²

Lastly, plaintiffs argue that the trial court should be disqualified from hearing this trial on remand. Although the transcript of the trial indicates that the trial court was antagonistic to plaintiff's counsel, this issue has been rendered moot by the retirement of the presiding trial judge.

¹ We note that in *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980), we held that where a contested issue involves medical issues beyond the scope of lay knowledge, testimony by a lay witness may be improper. In *Howard*, the plaintiff had injured his hip in an automobile accident prior to the alleged assault by defendants. However, he claimed that the assault caused him to undergo hip surgery. We held that objection to this line of testimony was proper because plaintiff was not qualified to render an opinion regarding the underlying basis for his hip operation. The present case is factually distinguishable. Plaintiff Sharon Burton testified that the smell of chemicals was distinguishable, and her symptoms occurred when the chemicals were sprayed improperly. This information was within her knowledge as a lay witness and did not require an expert to establish. *Id.*

² Likewise, the trial court, on retrial, is permitted to examine plaintiffs' motion in limine regarding exclusion of other claims, and we also will not reach this evidentiary issue.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh